



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2005

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2005-02216

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 220277.

The Texas Department of Transportation (the "department") received two requests for "all draft agreements, plans and all communications between the Texas Transportation Commission, TxDOT, and [the] Governor's office with Cintra for the TCC-35 project from 1/1/2003 to [12/21/2004]". We understand you to claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You also believe that the requested information implicates the proprietary interests of Cintra, Concesiones de Infraestructuras de Transporte, S.A. ("Cintra"), and you have notified them of the request for information and their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In its briefs to this office, Cintra claims that portions of the requested information are excepted from disclosure pursuant to section 552.110 of the Government Code and section 361.3023 of the Transportation Code. We have considered all claimed

exceptions and reviewed the submitted information.¹ We have also reviewed comments submitted by one of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that Cintra submitted to this office a copy of the information it believed to be responsive to the request for information, including a copy of the proposal it submitted to the department. The department asserts that Cintra's proposal is not responsive to the instant request. Whether information is responsive to the instant request is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* Open Records Decision No. 552 at 4 (1990). Accordingly, we must accept the department's representation that the proposal is not responsive to this request and that the responsive information is represented by the information it submitted to this office. Therefore, this decision only addresses the information that the department submitted to this office as responsive to the request. *See* Gov't Code § 552.301(e)(1).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses confidentiality provisions of other statutes. You assert that Exhibit B is confidential under section 361.3023 of the Transportation Code, which states the following:

(a) To encourage private entities to submit proposals under Section 361.3022, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 361.3022(h), the final rankings of each proposal under each of the published criteria are not confidential.

Transp. Code § 361.3023. Section 361.302 of the Transportation Code defines a “comprehensive development agreement” as “an agreement with a private entity that, at a minimum, provides for the design and construction of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project.” Transp. Code § 361.302. In this instance, you indicate that the information at issue relates to proposals regarding a comprehensive development agreement. Further, you inform us that the department has not entered into a final contract to which the submitted information relates. Based on our review of your representations and the submitted information, we conclude that the department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 361.3023 of the Transportation Code at this time.

Next, section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Dep’t of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. See Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. See *id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. See *id.* at 2.

You state that the documents in Exhibit C “consist of intraagency communication of internal pre-decisional deliberations regarding agency policy.” After careful review of the submitted information, we find that the documents in Exhibit C generally reflect the policymaking process of the department. Therefore, the department may withhold the Exhibit C pursuant to section 552.111.

In summary, the department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 361.3023 of the Transportation Code. The department may withhold Exhibit C under section 552.111 of the Government Code. As our ruling is dispositive, we do not address the remaining arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive, flowing style.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 220277

Enc. Submitted documents

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